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IN THE
Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

ABNER J. MORGAN, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON SCHOOL OF LAW
1100 N.E. Campus Way
Seattle, WA 98105
(206) 616-3167

ELAINE R. JONES
Director Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
JAMES L. COTT
*ROBERT H. STROUP
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013-2897
(212) 965-2200
**Counsel of Record*

Attorneys for *Amicus Curiae*

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT[1]

Interest of *Amicus*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons in securing their constitutional rights through the prosecution of lawsuits and to provide legal services to black persons suffering injustice by reason of racial discrimination. For six decades LDF attorneys have represented parties in litigation before this Court and the lower courts involving race discrimination and particularly discrimination in employment. LDF believes that its experience in, and knowledge gained from, such litigation will assist the Court in this case.

Summary of Argument

The petitioner and the United States as *amicus* ask this Court to interpret provisions of Title VII of the Civil Rights Act of 1964 (the "Act") in a way that is contrary to the express language of the statute as well as the legislative history of the Equal Employment Opportunity Act of 1972 (the "1972 Act"). This Court should reject this effort to override Congressional intent as well as Congressional action by limiting the scope of Title VII's continuing violation doctrine.

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[1]By letter to the Court dated July 26, 2001, the parties consented to the filing of *amicus curiae* briefs by any third party in support of either party. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

By their express terms, sections 706(e)(1) and 706(g)(1) of the Act serve different functions—the former serves as an exhaustion mechanism to invoke the administrative process while the latter serves as a limit on the remedial authority of the court after a finding of unlawfulness. The continuing violation doctrine relates to both sections, in that both the question whether or not the administrative process was invoked in a timely manner as well as the scope of back pay relief can be affected by application of the doctrine.

The continuing violation doctrine as applied in cases under Title VII of the Civil Rights Act of 1964 was developed by the federal courts in 1965-72 during a period when there was no express statute of limitations applicable to remedies under Title VII. When Congress amended the Act in 1972, it recognized the absence of a statute of limitations and imposed a two-year cap on back pay, rather than allowing the courts to award damages in continuing violation cases back to the effective date of the Act—July 2, 1965—or to apply varying state statutes of limitations. At the same time, however, Congress endorsed case law that had developed interpreting certain violations as continuing in nature.

Both prior to and shortly after the passage of the 1972 Act, courts have, in the context of the continuing violation doctrine, treated the two-year period as a cap on back pay so long as the administrative process has been invoked in a timely fashion. This is consistent with the underlying policies of the Act—to assure that stale claims are not subject to processing by the administrative agency and the courts—while at the same time affording victims of ongoing patterns or policies of discrimination the fullest relief possible. This Court should not treat the administrative exhaustion requirement as a statute of limitations when neither Congress nor the courts (both prior and shortly after enactment of the 1972 Act) treated it as such. Rather, as the court below recognized, in the limited

circumstances where continuing violations exist, Title VII authorizes back pay relief up to two years prior to the filing of the charge, so long as the charge is otherwise timely filed. Nor is the defendant-employer prejudiced by issues of staleness. As this Court held in *Havens Realty Corp v. Coleman*, 455 U.S. 363 (1981) the policy against staleness that underlies traditional statutes of limitations is satisfied by the continuing violation doctrine because some discriminatory act must occur or discriminatory policy exist within the charge-filing period.

The position advanced by the United States in this case is not only contrary to positions it has asserted before this Court and before many of the courts of appeals for nearly thirty years, but it is also directly contrary to existing federal regulations adopted by the Equal Employment Opportunity Commission and binding upon the federal agencies, including the Department of Justice. Those regulations provide that federal employees are entitled to recover back pay for two years prior to the filing of the administrative charge when they prove a continuing violation.

Finally, this Court should not engraft onto the Act a disqualification from relief for victims of discrimination who, knowingly or unknowingly, fail to file an administrative charge within 180 or 300 days of experiencing the first instances of a continuing course of discrimination. Imposition of such a disqualification was not a feature of the continuing violation doctrine prior (or immediately subsequent) to passage of the 1972 Act. If Congress were to determine that such a disqualification is appropriate, Congress can legislate such a provision. However, there is no such provision within the Act itself and such a disqualification would be directly contrary to the "make whole" purpose of the Act. "The scope of relief under . . . the Act is intended to make the victims of unlawful discrimination whole, and . . . requires that persons aggrieved . . . be so far as possible, restored to a position where they

would have been were it not for the unlawful discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (quoting Section-by-Section Analysis by Senator Williams related to the 1972 Act, 118 Cong. Rec. 7168 (1972)).

Disqualifying a plaintiff from full relief under the continuing violation doctrine based upon when the plaintiff knew or should have known of the discriminatory nature of the employer's conduct is unnecessary to protect an employer against "stale" claims. This is because the continuing violation doctrine under Title VII requires that a timely charge be filed with the EEOC in order to obtain relief. There is, then, no issue of staleness, and no need for an "inquiry notice" test. Because the continuing violation doctrine applies only to those limited instances where an employer engages in a pattern or policy of discrimination, or a series of related discriminatory acts, the employer has readily the means to relieve itself from the reach of the doctrine—the employer need only stop violating the law. To penalize a plaintiff for not seeking to invoke the administrative process at the earliest instances of what turns out to be a continuing course of discrimination places the burden of stopping discrimination upon the victim of discrimination. That burden is more appropriately assigned to the wrongdoer—the employer who is violating the law by maintaining a policy of discrimination or engaging in a pattern or series of discriminatory acts.

ARGUMENT

I. THE TEXT AND LEGISLATIVE HISTORY OF THE TWO-YEAR BACK PAY LIMIT IN SECTION 706(g)(1) DEMONSTRATE THAT THE 1972 AMENDMENTS TO TITLE VII CODIFIED A CONTINUING VIOLATION DOCTRINE THAT PERMITS RECOVERY OF BACK PAY TWO YEARS PRIOR TO FILING THE CHARGE.

The decision of the Court of Appeals in this case properly applies the continuing violation doctrine endorsed by Congress in its 1972 amendments to Title VII of the Civil Rights Act of 1964. In contrast, the decision of the district court, and the brief for petitioner before this Court, rest on a fatally flawed premise: that the charge filing period in section 706(e)(1)[2] (in this case 300 days) precludes a court from providing any remedy for violations of Title VII occurring prior to that period. That interpretation of section 706(e)(1) cannot be reconciled with the existence of section 706(g)(1),[3] which

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[2] Section 706(e)(1) provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice. . . , such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred. . . .

42 U.S.C. § 2000e-5(e)(1).

[3] Section 706(g)(1) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such

establishes for back pay awards an express and considerably longer two-year limitation period.

If section 706(e)(1) itself established the anterior temporal limitation on the Title VII violations that could be redressed, it would bar back pay awards for losses that occurred more than 300 days before the filing of the charge. Such a 300-day cutoff, however, would render meaningless the two-year cutoff provision of section 706(g)(1).

In an effort to avoid this implausible conclusion, the United States suggests that the two-year back pay limit was adopted to limit monetary relief in cases in which the 300 (or in some cases 180) day charge-filing period was extended by equitable tolling. (Brief of United States, 25). But section 706(g)(1) would limit back pay in such cases only if the charge filing period were extended by equitable tolling for at least 14 (in deferral states more than 18) months.[4] Experience with enforcement of the Act suggests that this is highly unlikely to happen. The United States has not identified a single Title VII case in which this has occurred, either before or after the 1972 amendments. This is not the circumstance that would have prompted Congressional action.

In the alternative, the United States urges that the two-

> affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, . . . or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

42 U.S.C. § 2000e-5(g)(1).

[4]The charge filing period is usually 6 months (180 days) in non-deferral states and 10 months (300 days) in deferral states.

year limit was adopted to limit back pay awards in pattern or practice cases brought by the Department of Justice. (Brief of United States, 25). But the 1972 legislation stripped the Department of responsibility for most such cases, transferring it to the EEOC, which in turn is only authorized to bring a civil action in response to a timely-filed Title VII charge. 42 U.S.C. § 2000e-6(c).

The far more reasonable interpretation of the statute is that section 706(e)(1) constitutes an exhaustion requirement, not a statute of limitations. Where an ongoing violation continues into the charge filing period, the requirements of section 706(e)(1) itself are met; the temporal limitation on the back pay period is provided by section 706(g)(1) rather than by section 706(e)(1). The legislative history of section 706(g)(1) makes clear that this interpretation is precisely how Congress understood the two-year back pay limit when it was adopted in 1972.[5]

The two-year back pay provision of section 706(g) has its origins in the continuing violation doctrine, which by 1971 was fairly well established in the lower courts.[6] Early decisions

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[5]Because the National Labor Relations Act has no analogous two-year back pay cap, petitioner's reliance upon that statute as authority (Brief of Petitioner, at 23-25) is misplaced. The two-year cap in Title VII was not modeled on the National Labor Relations Act.

[6]*E.g.*, *Mixson v. Southern Bell Tel. & Tel. Co.*, 334 F. Supp. 525, 527 (N.D. Ga. 1971)("if the alleged unlawful employment practice is continuous in nature, the 90-day limitations period for filing with the EEOC does not apply since there is no single date after which the period might begin to run"); *Austin v. Reynolds Metals Co.*, 327 F. Supp. 1145, 1153 (E.D. Va. 1970) ("an allegation to the Commission of continuing discrimination can [bring] events which occurred before the prior ninety days to the Commission's attention."); *Watson v. Limbach Co.*, 333 F. Supp. 754 (S.D. Ohio 1971) (August, 1968 charge was timely basis to challenge August, 1967 rejection for hire in light of continuing use during charge

assumed that the only limitation in Title VII itself was the effective date of the statute, July 2, 1965.[7] There were in pre-1972 decisions repeated references to "continuing violations," and most participants in the legislative process read these cases to mean that Title VII itself contained no back pay limitations period. That proved to be an accurate understanding of those cases;[8] the lower courts ultimately divided as to whether the back pay for pre-1972 Title VII actions should be limited by the

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filing period of discriminatory hiring test); *Tippett v. Liggett & Myers Tobacco Co*, 316 F. Supp. 292 (M.D.N.C. 1970) (Females adversely impacted by actions in July, 1965 entitled to relief on basis of EEOC charges filed May, 1968 in light of showing that violation was continuing in nature).

[7]*E.g., Meat Cutters v. Safeway Stores, Inc.*, 4 FEP Cas. 510, 512 (D. Kan. 1972) ("The effective date for awarding back pay in this case would be the effective date of Title VII on July 2, 1965"). The United States asserts that two lower court cases had held that the charge filing period limited the scope of back pay even in the case of a continuing violation: *United States v. Georgia Power Co.*, 1971 WL 162 *27, 3 FEP Cas. 767 (N.D. Ga. 1971); *Johnson v. Goodyear Tire & Rubber Co.*, 349 F. Supp. 3, 18 n.8 (S.D. Tex. 1972). (Brief of United States, 25) However, in neither case did the court consider the continuing violation doctrine, and in *Georgia Power*, 3 FEP Cas. at 788-89, the court held that the Department of Justice could not obtain back pay in a pattern or practice case. Had this rule of law not have been reversed on appeal, there would have been no need for a back pay cap on suits brought by the United States. Neither of these cases supports the government's position here.

[8]*E.g., United States v. Georgia Power Co.*, 474 F.2d 906, 922 (5th Cir. 1973) ("Though private complaints must be filed before the EEOC within 90 days, we cannot agree with the company that this period is the proper measure. This deadline is designed primarily to enhance the possibility of informal, out-of-court resolution of employment discrimination complaints through prompt administrative action. It is in no sense a limitation on the period for which one may receive back pay relief. Employment discrimination may as readily be a continuing course of conduct as a single event.").

effective date of the Act[9] or the most analogous state limitations period.[10] The United States itself asserted, in a number of cases, that Title VII had no statute of limitations and that the scope of relief was determined by either the effective date of the act or by borrowing state law, not the charge-filing period.[11] The government's assertion in its brief in this case,

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[9]*E.g., Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233-34 (4th Cir. 1975) (awarding back pay to July 2, 1965 on basis of EEOC charge filed May, 1967); *In re Consolidated Pretrial Proceedings*, 582 F.2d 1142, 1147, 1150 (D. C. Cir. 1978) *aff'd in part, rev'd in part on other grounds sub nom. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) (relief afforded from July 2, 1965 based on EEOC charge filed May 31, 1970).

[10]*E.g., Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1093-94 (D.C. Cir. 1984) (in absence of federal limitations period, borrowing Minnesota statute of limitations for Title VII claim brought by private plaintiffs prior to 1972); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 468-69 (D.C. Cir. 1976) (providing for the application of the analogous state statute of limitations to award of back pay in suit brought by private parties under Title VII); *EEOC v. Enterprise Ass'n Steamfitters*, 542 F.2d 570, 590 (2d Cir. 1976) (borrowing New York state statute of limitations to private and governmental lawsuits filed under Title VII in 1971); *EEOC v. Detroit Edison*, 515 F. 2d 301, 315 (6th Cir. 1975) (borrowing Michigan limitations period for Title VII action brought by private and United States plaintiffs); *Franks v. Bowman Transp. Co.*, 495 F. 2d 398, 405 (5th Cir. 1974) (applying Georgia statute of limitations for back pay relief in private Title VII action); *Pettway v. American Cast Iron Pipe Co.*, 494 F. 2d 211, 258 (5th Cir. 1974) (borrowing Alabama statute of limitations in private Title VII action); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1378 (5th Cir. 1974) (rejecting argument that 90-day charge filing period was a limitation on relief, court borrowed Texas statute of limitations for private suit under Title VII).

[11]In January, 1972, just prior to passage of the 1972 Act, the EEOC asserted that "no court has heretofore imposed a time limitation on the relief available to rectify the continued impact of discrimination, other than the effective date of Title VII, July 2, 1965." Brief for United States Equal Employment Opportunity Commission as *amicus curiae* at 5, *King v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) (No. 71-3293); *See also*

that the "traditional" continuing violations doctrine does not authorize relief for actions occurring prior to the charge-filing period (Brief of United States, 12), is contrary to the legislative history, substantial court authority both before and shortly after the 1972 Amendments and the government's own position in numerous litigated cases.

The legislative history of the two-year back pay limitation is set out in detail in Appendix A. The legislative history demonstrates that Congress intended to incorporate a two-year cap on back pay liability, using as models the statutes of limitations found in the Fair Labor Standards Act, the Walsh-Healy Act, the Bacon-Davis Act and the Equal Pay Act.[12] The impetus for the incorporation of the cap was then-developing case law and the position of the federal government that Title VII itself did not contain any limitations period and that an employer's back pay liability extended back to the

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Brief for United States Equal Employment Opportunity Commission as *amicus curiae* at 13, *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) (No. 73-1712) (arguing that it was error to apply 90-day charge filing period as a limitations on back pay recovery in Title VII action brought by private plaintiffs); Brief for United States Equal Employment Opportunity Commission as *amicus curiae* at 43, *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) (No. 73-1163) (arguing that Alabama's one year statute of limitations was applicable to Title VII back pay claim in private plaintiffs' action).

[12]Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 1746, 92nd Cong., 1st Sess. 281 (1971) ("House Hearings"); Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess.. 360-61 (1971) ("Senate Hearings") (statement of Gerard Smetana). See Appendix A, attached, at A1-2, A5, A9.

effective date of the Act—July 2, 1965.[13]

The assertion of the United States in this case that the two-year cap was designed for very limited circumstances (situations of equitable tolling and/or Department of Justice pattern or practice cases) (Brief of United States, 25) is not supported by the legislative history. That history contains repeated statements of concern by various members of Congress that a back pay cap was necessary to remedy the potential exposure of employers to the award of back pay from July 2, 1965. That concern was much broader than the United States has suggested here. *See, inter alia*, testimony of Congressman Ellenborn (Appendix, A3-4, A8) and Senator Beall (Appendix A11).

In sum, Congress adopted the two-year rule with the understanding that Title VII contained no anterior limitation on back pay awards other than the effective date of the statute. That was a correct reading of caselaw both before and after 1972. Against that background members of Congress repeatedly expressed their understanding that section 706(g)(1) would constitute the statute of limitations in Title VII cases. (Appendix A3, A5-7, A10). The Department of Justice, disavowing the position it has taken for nearly three decades,[14]

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[13] *See, e.g.*, the testimony of William H. Brown, Commissioner of the Equal Employment Opportunity Commission, that employers faced back pay liability from July 2, 1965, without limitation. (Appendix, A2).

[14] Contrary to its position here, the United States has repeatedly asserted that the continuing violation doctrine authorizes relief for discriminatory acts occurring prior to the charge-filing period, with a cap of two years on back pay recovery. *See, e.g.*, Brief of the United States at 50-51, *Trout v. Lehman*, 702 F.2d 1094 (D.C. Cir. 1983) (Nos. 81-2370, 82-1305), *vacated and remanded on other grounds*, 465 U.S. 1056 (1984) ("The 'continuing violation' doctrine provides a limited exception to the time limitations embodied in Title VII. A plaintiff may recover for

apparently insists that this interpretation was mistaken, that the charge-filing period has always been the limit on back pay, and that Congress intended that in all but exceptional cases the anterior limit would be either 180 or 300 days. It is, however, far too late to revisit the assumptions on which the 1972 legislation was based, or to litigate whether the caselaw which prevailed in that era, and which the chairman of the EEOC expressly brought to the attention of Congress, was in error. "Whether that understanding of Congress was in some ultimate sense incorrect is not what is important in determining the legislative intent in amending the 1964 Civil Rights Act." *Brown v. General Services Administration,* 425 U.S. 820, 828 (1976).

In the 1972 Act, Congress dealt with two different time periods. It increased the time period for invoking the administrative process and it imposed a two year cap on back pay relief. In so doing, it expressly endorsed existing case law which treated some violations as continuing in nature, and further stated, in the authoritative Section-by-Section analysis by Senator Williams, that in so amending Title VII, existing case law treating certain types of violations as continuing in nature were "not affected." (Appendix, A12). That is, the charge-filing period was not to be treated as a bar to relief in cases involving continuing violations, as the courts had not treated it as a bar in cases predating the 1972 Act.

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discrimination which occurred outside the relevant time period, if that discrimination was part of a policy or practice of discrimination which continued into the relevant time frame. *E.g., Jewett v. ITT Corp.*, 653 F.2d 89, 91-93 (3rd Cir. 1981); *Milton v. Weinberger*, 645 F.2d 1070, 1075-77 (D.C. Cir. 1981); *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 725 n.73 (D.C. Cir. 1978)."); *See also* Brief of United States at 28, *United States v. City of Warren*, 138 F.2d 1083 (6th Cir. 1998) (Nos. 97-1024, 97-1075).

II. THE INTERPRETATION OF TITLE VII NOW ADVANCED BY THE SOLICITOR GENERAL WOULD INVALIDATE EXISTING FEDERAL REGULATIONS AND DIRECTIVES.

The Solicitor General has in the instant case asserted that (except in exceedingly rare situations) it is the section 706(e)(1) charge-filing period, not section 706(g), which controls the starting date for back pay calculations. (Brief of United States, 25). The United States acknowledges that this represents a repudiation of the longstanding position of the EEOC (Brief of United States, 23); it is also at odds with the generally accepted view of the law and the position the government has advanced for nearly three decades.[15]

In *Brown v. General Services Administration,* 425 U.S. at 828 n.10, the plaintiff urged that federal employees should be permitted to bring employment discrimination claims under statutes other than Title VII. In opposing that contention, the United States advised this Court that in a Title VII action the commencement of the back pay period would be controlled by

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[15]Even defendant-employers filing *amicus* briefs in this Court have repeatedly insisted that the two-year rule in section 706(g) (1) governed the beginning of the back pay period. *See, e.g.,* Brief on Behalf of the Chamber of Commerce of the United States at 36 n.53, No. 74-389, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (No. 74-389) ("when an employer is charged with a Title VII violation, his potential liability for back pay extends backward two years prior to the date the charge is filed with the Commission. (section 706g)."); Brief of the Texas Association of Business at 12 n.16, *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977) (No. 76-99) ("back pay liability on all issues raised in the EEOC's lawsuit extends back to March 9, 1969, two years prior to the filing of the original charge"); *id.* at 17 n.29 ("Section 706(g) provides a limitation on back pay liability to two years prior to the filing of the charge.").

the two-year rule in section 706(g)(1).[16] The government objected that if federal workers could sue under statutes other than Title VII then "the district court may award back pay without regard to the two-year limit under Title VII."[17]

In *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977), the Solicitor General, in urging that the EEOC could bring an action more than 180 days after the filing of a charge, assured the Court that even where the EEOC delayed filing suit the magnitude of the total back pay award would be limited because "Congress has expressly limited employers' liability for back pay to two years of a charge's filing."[18]

In its brief in the instant case, the government insists that this Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), did not adopt a continuing violation doctrine for cases under the Fair Housing Act, and thus provides no support for such a doctrine in Title VII cases. (United States Brief, 18). But in *Havens Realty* itself the Solicitor General urged the Court to adopt a continuing violation rule, and to do so precisely because that rule already existed in Title VII cases. (Brief for the United States, No. 80-988, pp. 9-10 n.9.). And in *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989), the United States characterized *Havens Realty* as having adopted a continuing violation doctrine that

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[16]Brief for Respondents, No. 74-768, at 17-18 ("Section 706(g) authorizes the district court . . . to grant . . . back pay for a period not to exceed two years prior to the filing of the initial administrative complaint.").

[17]*Id.* at 19.

[18]Brief for the EEOC, No. 76-99, at 39 (quoting *EEOC v. Kimberly-Clark Corp.*, 511 F. 2d 1352, 1358 n. 9 (6th Cir. 1975)).

should be applied to Title VII cases. (Brief for the United States, No. 87-1428, p. 12.).[19]

Only four years ago the Department summarized the origins of the two-year back pay rule as follows:

> As originally enacted, in 1964, Title VII contained no explicit limitation on back pay. For actions filed before the 1972 amendments to Title VII, courts therefore applied the most analogous state statute of limitations to claims for back pay under the Act. . . . . When Congress amended Title VII in 1972, it added Section 706(g). . . . In *Albemarle*, . . . the Supreme Court noted that in enacting the amendments in 1972, Congress rejected a provision that would have limited an employer's back pay liability to two years prior to the filing of a complaint in court.

(Brief for the United States at 28, *United States v. City of Warren*, 138 F.2d 1083 (6th Cir. 1998) (Nos. 97-1024, 97-1075). Yet in this Court the government insists the adoption of section 706(g)(1) is of no real consequence to Title VII limitations.

Most significantly, the position of the Solicitor General conflicts with the regulations governing administrative complaints of employment discrimination by federal agencies, 29 C.F.R. part 1614, and with Management Directive 110. The government urges this Court to adopt an interpretation of Title VII under which its own regulations, and Management

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[19]Quite plainly, this Court in *Havens Realty* did permit recovery for acts prior to the start of the charge-filing period. Although all claims of plaintiff Coleman were prior to the charge-filing period, this Court concluded that the 180-day filing period "is no bar" because the claims of co-plaintiff Coles occurred within the 180-day period and the violation was a continuing one. *Havens Realty*, 455 U.S. at 380-81.

Directive 110, would necessarily be invalid. The approach taken by the Solicitor General is precisely backwards; the presumptive validity of the regulations and Management Directive 110 are of controlling importance in determining the correct interpretation of Title VII.

With regard to federal sector discrimination, the EEOC now exercises the government-wide rulemaking and adjudicatory authority originally accorded to the Civil Service Commission. Section 717(a) forbids the same discriminatory practices prohibited by section 703 of Title VII. Section 717(b) provides in part:

> [T]he Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, . . . and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate . . . . The head of each . . . department, agency or unit shall comply with such rules, regulations, orders and instructions.

42 U.S.C. § 2000e-16(b). With regard to federal sector discrimination, therefore, section 717(b) authorizes the EEOC to issue legislative regulations and orders and those regulations and orders not only constitute a permissible interpretation of the remedial provisions of Title VII itself but also embody interpretations of Title VII which are entitled to deference under *Chevron U.S.C. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Management Directive 110 instructs federal agencies regarding the manner in which they are to handle administrative complaints of discrimination. The regulations require aggrieved employees or applicants to contact an EEO counselor within 45 days of the alleged discrimination. 29 C.F.R. § 1614.105(a). Management Directive 110 provides that federal

agencies—including, of course, the Department of Justice—must apply a continuing violation doctrine in determining the scope of relief to be awarded for proven discrimination.

> [I]ncidents that occurred outside the 45-day time limit should be investigated and remedied to the extent that they are sufficiently interrelated to a timely raised incident such that a continuing violation has been established. A continuing violation is a series of related acts, one or more of which falls within the limitations period, that are tied together with a common theme uniting the alleged discriminatory acts into a continuous pattern. When determining if a continuing violation exists, the following information is relevant to, but not necessarily dispositive of, the issue: whether the same officials were involved in the incidents, whether the incidents were similar in nature, and whether they recurred or were of a more isolated nature.

(Management Directive 110, Ch. 5, part III(A) (3)); *see* http://www.eeoc.gov/federal/md110.html). If, for example, a worker within the Department of Justice were to file a complaint of salary discrimination, Management Directive 110 would compel the Attorney General to utilize this continuing violation doctrine in determining the period for which relief was required.

The Commission's federal sector regulations impose the same obligation. An individual who demonstrates that he or she was the victim of discrimination is entitled to "[p]ayment . . . on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination." 29 C.F.R. § 1614.501(a) (4). The only limitation on this make whole obligation is the two-year back pay rule. "[B]ack pay liability

under Title VII . . . is limited to two years prior to the date the discrimination complaint was filed." *Id.* at § 1614.501(c)(1).

The regulations provide that an administrative "complaint" is the equivalent of a Title VII charge. 29 C.F.R. §§ 1614.407 (time period for filing suit), 1614.501(c) (1) (date from which back pay limit is calculated.). The regulations structure the complaint filing process in a manner which utterly precludes any possibility that the time limit for filing an administrative complaint could define the period of time for which pre-complaint backpay or other relief could be awarded. The deadline for filing a complaint is only 15 days—unimaginably short as a limitation period, and only one twentieth of the 300 day charge-filing period—and the deadline runs from the end of counseling, not from the occurrence of a discriminatory practice. 29 C.F.R. § 1614.106(b).

The regulations regarding class complaints are equally clear. Once there has been a finding of the existence of a class-wide discriminatory policy or practice, "[r]elief otherwise consistent with this Part may be ordered for the time the policy or practice was in effect." 29 C.F.R. § 1614.204(l)(3). The only back pay relief that would not be inconsistent with a provision of part 1614 would be back pay extending more than two years prior to the filing of the class complaint. See 29 C.F.R. §§ 1614.501(b) (3), 1614.501(c)(1).

In promulgating these regulations, the EEOC has made clear that they embody the continuing violation doctrine also codified in Management Directive 110. Although the regulations require a discrimination victim to contact an EEO counselor within 45 days, that abbreviated time period does not limit the relief that can be accorded for a continuing violation.

> Under the continuing violation theory . . . incidents occurring earlier than 45 days before contact with the counselor must also be remedied provided that the initial contact with the counselor was timely and the earlier incidents were part of the same continuing policy or practice found to have been discriminatory. That is, where contact with the counselor is timely as to one of the events comprising the continuing violation, then the counseling contact is timely as to the entire violation.

64 Fed. Reg. 37653 (1999). Similarly, 29 C.F.R. § 1614.204(l) (3) requires a class agent to prove the existence of a discriminatory practice or policy in existence within 45 days of the initial contact with an EEO counselor. But once discrimination within that period has been shown, monetary relief is available for the full two-year period. "[T]he 45-day time limit in section 204(l) (3) defining the period for which class-wide discrimination can be found is not intended to limit the two-year time period for which back pay can be recovered by a class member." 64 Fed. Reg. 37653 (1999); see 57 Fed. Reg. 12644 (1992).

III. DISQUALIFYING A PLAINTIFF FROM FULL RELIEF FROM A CONTINUING VIOLATION ON THE BASIS OF WHEN THE PLAINTIFF KNEW OR SHOULD HAVE KNOWN OF THE DISCRIMINATORY NATURE OF THE EMPLOYER'S UNLAWFUL CONDUCT IS NOT SUPPORTED BY EITHER THE LANGUAGE OF THE ACT OR ITS LEGISLATIVE HISTORY.

Both the petitioner and the United States propose that this Court impose upon Title VII's continuing violation doctrine a disqualification from relief based upon the date when a victim of a continuing pattern or practice of discrimination first appreciates the discriminatory nature of his/her employer's conduct. (Brief of United States, 17; Brief of Petitioner, 40-

44). A number of court of appeals have adopted such tests. *See, e.g., Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983) (Does the act "have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights. . . ."); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989) (Did the plaintiff have "no reason to believe he was a victim of discrimination. . . ."); *Sabree v. United Brotherhood of Carpenters & Joiners*, 921 F.2d 396, 402 (1st Cir. 1990) ("What matters is whether, when and to what extent the plaintiff was on inquiry notice."). However, some courts still apply the continuing violation doctrine without imposing such a disqualification. *See, e.g., Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) (applying three-part test of *Baker v. F & F Investment Co.*, 489 F.2d 829, 836 (7th Cir. 1973)).

The Act itself contains no provision articulating such a limitation. Nor was such a test included in the initial Title VII continuing violation doctrine adopted by the courts prior to the 1972 Amendments. *See, e.g.*, cases cited *supra*, n.6. Indeed, the court of appeals cases applying the continuing violation doctrine throughout the 1970s and early 1980s did not include a test of whether or not the plaintiff had knowledge (or should have had knowledge) of the discriminatory nature of the employer's practices at the plaintiff's earliest exposure to that unlawful activity.[20] Nor is such disqualification a part of the

[20] *E.g., Guardians Ass'n of New York City v. Civil Serv.Comm'n*, 633 F.2d 232, 237-38, 247-51 (2d Cir. 1980), *aff'd* 463 U.S. 582 (1983) (providing relief for discriminatory acts occurring prior to the 300-day charge-filing period in case challenging City's use of discriminatory employment tests without inquiry into plaintiff's knowledge); *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1082, 1087 (4th Cir. 1977) (In challenge to discriminatory promotion system, court affirmed award of back pay starting in 1967 on basis of EEOC charges filed in 1969 without a test of plaintiff's earlier knowledge); *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1309 (5th Cir. 1980) (holding that back pay accrued from two years prior to the charge for actions preceding the two-year cap so long as current violation was shown; no inquiry into plaintiff's knowledge of discriminatory nature of defendant's practices); *Hall v. Ledex*, 669 F.2d 397, 398 (6th Cir. 1982) (Upon showing of continuing violation, court properly awarded back pay for promotion action occurring in April, 1974, more than 300 days prior to filing of charge on May 9, 1975; no inquiry into what plaintiff knew or should have known); *Patterson v. Youngstown Sheet & Tube Co.*, 659 F.2d 736, 740 (7th Cir. 1981) (applying two-year limitation on back pay to private plaintiff's challenge to continuing discriminatory promotion system; no test of plaintiff's prior knowledge of discrimination); *Williams v. Owens-Illinois*, 665 F.2d 918, 924 (9th Cir. 1982) (Upon showing of a continuing discriminatory policy in promotions and job placements, plaintiffs were entitled to "base claims" upon discriminatory acts occurring prior to charge-filing period; no inquiry into plaintiff's prior knowledge); *Rich v. Martin Marietta*, 522 F.2d 333, 348 (10th Cir. 1975) (rejecting application of 90-day charge-filing period rather than two-year period as limit of relief for continuing violation of act in promotion case brought by private plaintiff; no test of plaintiff's prior awareness of discrimination); *Stallworth v. Schuler*, 777 F.2d 1431, 1435 (11th Cir. 1985) (affirming award of back pay for two years prior to EEOC charge for high school principal's claim of continuing pattern of discrimination in promotions; no test as to plaintiff's notice); *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 723-26 (D.C. Cir. 1978) (employer's continuous campaign of negative references, beginning after termination of plaintiff's employment in 1968 constituted continuing violation for which relief could be granted based upon 1973 EEOC charge; no inquiry into plaintiff's prior awareness of discriminatory nature of defendant's conduct).

continuing violation test adopted by this Court in *Havens Realty*.

The engrafting of such a barrier to relief onto the statute is inconsistent with Congressional purpose. Such a requirement is directly contrary to the "make whole" purpose of the Act. As this Court has repeatedly observed, "the scope of relief under . . . the Act is intended to make the victims of unlawful discrimination whole. . . and requires that persons

aggrieved . . . be so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. at 421 (quoting Section-by-Section Analysis by Senator Williams related to the 1972 Act, 118 Cong. Rec. 7168 (1972)). *See also Teamsters v. United States*, 431 U.S. 324, 364 (1977) ("An equally important purpose of the Act is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.' (citing *Albemarle Paper*, at 418)). In determining the specific remedies to be afforded, a district court is 'to fashion such relief as the particular circumstances of a case may require to effect restitution.'" (citing *Franks v Bowman Transp. Co.*, 424 U.S. 747, 764 (1976)).

Further, the imposition of this additional test places upon the victim the cost of an employer's ongoing course of discriminatory conduct under the guise of protecting the employer from stale claims. However, because the continuing violation doctrine requires a timely charge, there is no issue of staleness, and there is no need otherwise to protect the employer against staleness. In the 1972 Act, Congress determined the extent to which a wrongdoer would be held liable for its unlawful conduct and settled upon a two-year limit for continuing violations. That is a legislative choice based upon a balancing of interests and is a choice that the federal courts should not alter.

The continuing violation doctrine applies only in limited circumstances. It does not apply to instances where an employer engages only in an isolated act of discrimination. Rather, it applies to those instances where an employer engages in a pattern or policy of discrimination, or a series of related discriminatory acts. In such circumstances, the employer has the means to relieve itself from the reach of the doctrine—the employer need only stop violating the law. To penalize a plaintiff for not invoking the administrative process at the

earliest instances of discrimination places the burden of stopping discrimination upon the victim of discrimination. That burden is more appropriately assigned to the wrongdoer—the employer. The doctrine, after all, applies only to an employer who is violating the law by continuing a discriminatory policy, or engaging in a pattern or series of discriminatory acts and has within its own power the ability to end its exposure to the doctrine by ending the unlawful discrimination.

Two courts of appeals have reached similar conclusions in considering the underlying purposes of the continuing violation doctrine. *Roberts v. North American Rockwell Corp.*, 650 F.2d 823 (6th Cir. 1981) ("Title VII advances important federal goals. To require that suit be filed at the first instance of discrimination or not at all would frustrate Title VII. Broad, remedial acts such as Title VII should be liberally construed to encourage the eradication of discrimination."); *Belt v. Johnson Motor Lines, Inc.*, 458 F.2d 443, 445 (5th Cir. 1972) ("We cannot agree with the district court that a discriminatory labor practice may not be a continuing act. To so hold on the facts of this case would permit discriminatory acts to go unrebuked, a construction far too restrictive and alien to the liberal construction we have previously given the Civil Rights Act of 1964.").

This Court should reject imposition of this inappropriate restriction upon relief under Title VII of the Civil Rights Act.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

ERIC SCHNAPPER
UNIVERSITY OF
WASHINGTON SCHOOL
OF LAW
1100 N.E. Campus Way
Seattle, WA 98105
(206) 616-3167

ELAINE R. JONES
Director Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
JAMES L. COTT
*ROBERT H. STROUP
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013-2897
(212) 965-2200
**Counsel of Record*

Attorneys for *Amicus Curiae*

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APPENDIX A

THE LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972

The initial impetus for the two-year rule apparently came from employers.[1] At the March 1971 House hearings a witness appearing in connection with testimony of the American Retail Federation submitted a written statement containing language of a proposed amendment limiting back pay to a period beginning two-years prior to the filing of the complaint.[2] The accompanying explanation objected that the lack of any limitations period was unfair to employers.

> Unless a reasonable limitation is placed upon the ability of plaintiffs to recover past damages . . . frivolous and totally unnecessary lawsuits will be encouraged. The possibility of enormous monetary liability under Title VII, especially in view of the increased use of class-type suits, regardless of the actual liability of the charged party, is clear.[3]

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[1]See George T. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 881 (1972).

[2]*Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 1746*, 92nd Cong., 1st Sess. 476 (1971)("House Hearings")("No order made hereunder by any court shall include back pay or other liability which has accrued more than two years before the filing of a complaint with said court under this Title.")

[3]House Hearings at 281.

A two-year limitations period, the statement explained, would be "consistent with provisions contained in the Fair Labor Standards Act, the Walsh-Healy Act, the Bacon-Davis Act and the Equal Pay Act."[4]

Representative Erlenborn raised the issue during the testimony of the chairman of the EEOC.

> Mr. Erlenborn. At what point is this back pay award determined and is there any statute of limitations as to how far back you can go in the back pay award?
>
> Mr. Brown. Under the court decisions we can go back to the beginning of the act.[5]

Erlenborn argued that the lack of a limitations period was wrong, and would become increasingly unfair in the future as the number of years since 1965 rose.

> It seems to me that this class action and back pay award, that whole thing, has grown by practice and court decisions, and Congress has not turned its attention to this sufficiently. Under the NLRB there are limitations as to how far back pay awards can be made, or at what point back pay liability attaches. It seems to me Congress ought to turn its attention to some similar limitations in this area . . . . Should we, because no charge is made until 1985, have the employer in 1985 be liable for back pay to 1965, or isn't it reasonable to have some statute of limitations?[6]

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[4] *Id.*

[5] *Id.* at 89.

[6] *Id.* at 89-90.

Chairman Brown defended the absence of a limitations period, arguing that "as the back pay awards grow . . . there is going to be a growing likelihood that we are going to be able to settle more cases."[7]

Representative Erlenborn in response reiterated his objections.

> [T]here could be come reasonable limitation as to how far back the liability attaches. Now, we are talking about 1985. We could be talking about the year 2000 or beyond, with the liability still running back to the day the statute was enacted, which seems to me a bit unreasonable. . . . [W]e should have a statute of limitations.[8]

The witness whose prepared statement had raised the issue strongly agreed with Erlenborn.

> I do propose a statute of limitations. I think the example that Chairman Brown gave in the colloquy with Congressman Erlenborn was a terrible one. If I think of Sears having to set up reserves up to the year 2000 because of possible liabilities, because in that year one could still go back to 1964, it would be a difficult situation to administer. So I would propose, as has worked under the Fair Labor Standards Act, then a 2-year statute of limitations, 2 years from the time a complaint is filed.[9]

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[7] *Id.*

[8] *Id.*

[9] *Id.* at 284-85.

Representative Erlenborn repeated his earlier objections and disagreement with Chairman Brown.[10]

Several weeks later, Representative Erlenborn introduced H.R. 6760, which would ultimately be adopted by the House in place of the Committee bill. H.R. 6760 included a two-year back pay limitation that was identical to the language proposed at the earlier hearing:

> No order made hereunder shall include back pay or other liability which has accrued more than two-years before the filing of a complaint with said court under this title.

The United States Chamber of Commerce strongly endorsed this proposal.

> [P]ermitting back-pay awards to date from the effective date of the Act, July 2, 1965, until final settlement is simply an attempt to coerce employers and unions through the threat of enormous liability into waiving their rights to a fair hearing.
>
> In other areas of law in which liability attaches, an injured or aggrieved party must take reasonably prompt action to enforce his rights. Back-pay awards should not be used as a form of punishment. We therefore support the

[10] *Id.* at 286 ("The problem that I discussed with the Chairman of Equal Employment Opportunity Commission is the lack of a statute of limitations . . . [P]ersonal injury or property damage claims or almost any other kind of claim . . . all have a limitation through a statute of limitations or the doctrine of laches. It would seem to me there is no reason why the same sort of approach should not be used in the case of these back pay claims and class actions, which, unfortunately, at the present time, do not have any sort of limitations. I just can't buy Chairman Brown's position that in the year 2050 a claim can run back to 1964, and I think that Congress should turn its attention to this problem.")

> amendment . . . contained in H.R. 6760 to set a two-year limit on back-pay liability. This provision, modeled upon the limitations contained in the Fair Labor Standards Act, is neither unreasonable with respect to the liability of a respondent nor burdensome upon a complainant.[11]

When the full committee took up the bill in May of 1971, however, it approved H.R. 1746, sponsored by Representative Hawkins, rather than H.R. 6760, and rejected a proposal to add a two-year limitation to H.R. 1746 itself.

Over the course of the summer of 1971 Representative Erlenborn and others lobbied members of the House to support H.R. 6760 (also reintroduced as H.R. 9247)[12] when it was offered as a substitute for H.R. 1746. In July Erlenborn placed in the Congressional Record an explanation of his proposal:

> As indicated in testimony before the House General Labor Subcommittee by EEOC Chairman Brown, remedies for discriminatory acts may reach back to the effective date of the Act, July 2, 1965. Arguments that the threat of enormous back pay liability will encourage conciliations are simply attempts to coerce employers and labor organizations into surrendering to the administrative process fundamental rights to a fair hearing and due process of law. Back pay awards should measure compensation, not punishment. Section 706(f) has been amended by the bill to limit liability to two-years preceding the filing of a complaint in court, following the pattern of the minimum wage law.[13]

[11] *Id.* at 476.

[12] The two-year limitations provision of H.R. 9247 was identical to that in H.R. 6760.

[13] 117 CONG. REC. 26555 (1971).

These repeated objections to the lack of a limitations period in Title VII evidently generated considerable opposition to the Hawkins bill. At the beginning of House debate on the legislation, Representative Dent offered on behalf of the supporters of H. R. 1746 an amendment that would have limited the retrospective reach of back pay to two-years before the filing of the charge with the EEOC.[14] Congressman Dent explained that the

> amendment would impose a 2-year "statute of limitations" on the awarding of back pay and reinstatement under [T]itle VII. Thus, if the EEOC or, in the case of an individual action, the Court, found that an unlawful employment practice existed, back pay liability could not be extends [*sic*] further than 2 years from the time the charge was filed with the Commission.[15]

Other supporters of H.R. 1746 also described the amendment as establishing a "statute of limitations."[16] This amendment was required, according to Dent, because under Title VII as originally enacted back pay awards could reach back to July, 1965.

> Today you go back to the date of the passage of the act and you could very easily create an injustice greater than the justice you were giving or trying to give. So we have a

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[14]"No order made hereunder shall include back pay or reinstatement liability which has accrued more than two-years before the filing of a charge with the Commission." 117 CONG. REC. 31784 (1971) (remarks of Rep. Dent).

[15]117 CONG. REC. 31784 (1971) (remarks of Rep. Dent).

[16]117 CONG. REC. 31961 (1971) (remarks of Rep. Perkins).

statute of limitations.[17]

The difference between the Dent proposal and the language in the Erlenborn bill was of considerable importance, because--as was repeatedly stressed during the hearings and debates--in this era the average Title VII charge was pending at the EEOC for some 20 months.[18]

Representative Erlenborn reiterated his earlier criticism of the lack of a limitations period in Title VII. Class actions, he warned,

> plus the liability of back pay without limitation, would create an horrendous potential liability. We would provide a limitation on liability through a 2-year statute of limitations. I would admit that the majority . . . has said, belatedly, that if they are given the opportunity, they would also apply a 2-year statute of limitations.[19]

Several members of the House expressed agreement with the position of Chairman Brown that back pay should continue to run (where the discriminatory practice was that old) from the effective date of Title VII. Representative Stokes denounced the Erlenborn proposal as a scheme to "minimize damage awards against discriminating employers and unions . . . a great leap backward in our struggle for equal employment opportunity."[20] Representative Abzug explained that she disagreed with even the Dent proposal, but was willing to

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[17]117 CONG. REC. 31979 (1971) (remarks of Rep. Dent).

[18]*See, e.g.*, H.R. REP. NO. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2170-71 (Minority Views).

[19]117 CONG. REC. 31973 (1971) (remarks of Rep. Erlenborn).

[20]117 CONG. REC. 32106 (1971) (remarks of Rep. Stokes).

accept it if necessary to win passage of the rest of H.R. 1746[21].

The most controversial difference between the Hawkins and Erlenborn proposals concerned what type of enforcement authority to give to the EEOC. Under H.R. 1746 the Commission would have been given the power to issue cease and desist orders to be enforced, like orders of the NLRB, by the courts of appeals. H.R. 6760, on the other hand, would have authorized the EEOC to bring civil actions in federal district court, the type of enforcement mechanism ultimately adopted. After a debate that focused primarily on this issue, the House voted by a narrow margin to adopt the Erlenborn bill as a substitute for the Hawkins bill that had been reported by the committee.

In the Senate hearings which followed, the key House proponents of a two-year limitation renewed their arguments. Representative Erlenborn described Chairman Brown's House testimony "that the EEOC's position is that remedies, including back pay, may reach back to the effective date of the Act, July 2, 1965. Although it is not clear, indications are that the courts have held similar positions."[22] Erlenborn explained that the House-passed bill "imposes a limitation on liability. A similar limitation exists in the National Labor Relations Act and the Fair Labor Standard[s] Act. This limit on liability would be 2 years prior to the filing of the complaint with the court."[23] The American Retail Federation complained that S. 2515, which had been proposed by Senator Williams, did nothing to address

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[21]117 CONG. REC. 32097 (1971) (remarks of Rep. Abzug).

[22]*Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92nd Cong., 1st. Sess. 189 (1971) ("Senate Hearings.")

[23]Senate Hearings at 173.

the lack of a statute of limitations under Title VII.

> S. 2515 makes no provision whatever for any limitation upon recovery. This failure is wholly inconsistent with provisions contained in the Fair Labor Standards Act, the Walsh-Healy Act, the Davis-Bacon Act, and the Equal Pay Act. The result is that an unknown or inadvertent violation of the Act could permit a recovery to the effective date of the Act. Thus, for example, in the year 2000 suit could be filed seeking recovery back to 1965. Assuming the number of plaintiffs were large enough and the cause were meritorious, it is doubtful that any company or union in the United States could survive the amount of the judgment.
>
> Experience with liability limitation standards have in other comparable areas led to rapid settlement and greater uniformity of compliance with statute's requirements. . . . A two-year statute of limitations also should have the statutory effect of diminishing agency backlog.[24]

The United States Chamber of Commerce also objected to continuing to permit back pay awards to run from July 2, 1965.[25]

In the Senate committee a consensus was reached in favor of a two-year back pay limitation, and S. 2515 was amended in

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[24]Senate Hearings at 360-61 (statement of Gerard Smetana).

[25]Senate Hearings at 496 ("permitting back-pay awards to date from the effective date of the act, July 2, 1965, until final settlement is simply an attempt to coerce employers and unions through the threat of enormous liability into waiving their rights to a fair hearing. In other areas of law in which liability attaches, an injured or aggrieved party must take reasonably prompt action to enforce his rights. Back-pay awards should not be used as a form of punishment. We therefore support the amendment to . . . set a two-year limit on back-pay liability.")

committee to bar back pay awards accruing more than two-years prior to the filing of the EEOC charge.[26] The limitation in the committee bill, however, applied only to orders issued by the EEOC, and did not limit judicial awards in cases litigated in federal court.[27]

In the legislative process that followed, both supporters of S. 2515, and those who preferred the House bill, consistently referred to the two-year rule (not the charge filing period) as establishing the retrospective limit on back pay. Although under S. 2515 the EEOC could adjudicate Title VII claims, the Senate Report explained, "[i]n issuing its order, the Commission, in any situation involving back pay, would be limited to an award of two-years prior to the date of the filing of the charge with the Commission."[28] Senator Dominick, although opposing the provision in S. 2515 authorizing EEOC to award back pay, approved its provision for "a 2-year limitation of back pay liability."[29] Senator Williams placed in the Congressional Record an analysis of the Committee bill which noted that "[a]n award of back pay is not to exceed that which has accrued more than two-years prior to the filing of a charge with EEOC."[30]

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[26]118 CONG. REC. 1071 (1972) (remarks of Sen. Beall).

[27]S. REP. No. 92-415 at 58 (1971).

[28]S. REP. No. 92-415 at 20 (1971); *see id.* at 38 ("back pay liability is limited to two-years prior to the filing of a charge with the Commission").

[29]117 CONG. REC. 39739 (1971) (remarks of Sen. Dominick on Amendment 611); *see* 118 CONG. REC. 302 (1972) (remarks of Sen. Dominick) (his amendment does not affect "the 2-year limitation of back pay liability.").

[30] 118 CONG. REC. 1071 (1972) (remarks of Sen. Williams).

The extended Senate debates which followed, like the House debates, centered on whether to give the EEOC cease and desist authority. Opponents of that proposal favored a substitute bill offered by Senator Dominick. Although Dominick assumed that a two-year back pay limitation was in his bill, that limitation was inadvertently omitted. Eventually Senator Beall, a supporter of S. 2515, pointed out that omission, and offered an amendment to the Dominick bill that was accepted by Dominick and approved unanimously.[31] The Dominick bill did not permit the EEOC to make back pay awards; the Beall amendment applied to judicial awards and (like the Dent amendment) ran from the date on which the charge was filed. The language of the brief debate reflected the Senate consensus about the length of the pre-charge period for which back pay could fairly be awarded.

> MR. BEALL. . . . [S]hould there be a finding in favor of the plaintiff in one of these cases, we want to make sure that the penalty is within the balance of fairness. In the committee, there was an agreement that should there be a finding, any award of back pay liability should not go back further than 2 years prior to the time that the charges were brought before the Commission.[32]

After extended debate a compromise was agreed upon by Williams, Dominick, and their supporters. Under the compromise proposal regarding back pay, awards were limited to the period beginning two-years prior to the filing of the charge with the EEOC. Without objection, Senator Williams placed in the Congressional Record a detailed section-by-

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[31]The language of that amendment, like the final bill, limited back pay to amounts accruing less than two-years before the filing of the Title VII charge. 118 CONG. REC. 1071 (1972)

[32]*Id.*

section analysis of the final compromise language. Williams described only the two-year rule, not the modified charge filing period, as limiting the amount of back pay.

> The court's award of back pay is limited to that which accrues from a date not more than two-years prior to the filing of a charge with the Commission. . . . The provisions of this subsection are intended to give the court wide discretion, as has been generally exercised by the courts under existing law, in fashioning the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the act is intended to make the victims of unlawful discrimination whole, and . . . so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. The broad reading of the need for effective remedies under this subsection is intended to be preserved in this bill.[33]

The bill also increased the charge filing period to 180 days, or 300 days in a deferral state. The explanation of the modified charge filing period was consistent with this account of the two-year back pay rule.

> In establishing the new time period for the filing of charges, it is not intended that existing law, which has shown an inclination to interpret this type of time limitation to give the aggrieved person the maximum benefit of the law, should be in any way circumscribed. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued.[34]

[33] 118 CONG. REC. 4942 (1972) (remarks of Sen. Williams just before final passage).

In the conference which followed, the critical relevant difference between the House and Senate bills was that under the Erlenborn substitute the two-year period ran from the date on which the complaint was filed in court, while in the Senate version that period ran from the filing of the charge with the EEOC. That difference was resolved in favor of the Senate version. The Conference Report explained:

> The court is authorized to award back pay except that such back pay liability is limited to that which accrues from the date not more than two years prior to the filing of a charge with the Commission.[35]

When he reported the conference bill to the Senate, Senator Williams again placed in the Congressional Record a section-by-section analysis. That analysis contained an explanation of the two-year limitation rule and the new charge filing period, and an endorsement of the continuing violation doctrine, that was identical to his earlier section-by-section analysis.[36] In the House, Representative Quie expressed particular regret that the two-year statute of limitations ran from the date of the charge rather than the commencement of the lawsuit.

> The part I feel especially is bad is the feature on the statute of limitations in this bill, which is not 2 years prior to enactment of this bill, but rather 2 years prior to the

[34] 118 CONG. REC. 4940 (1972) (remarks of Sen. Williams); see 118 CONG. REC. 4941 (1972) ("In any area where the new law does not address itself, . . . it is assumed that the present case law as developed by the courts shall continue to determine the applicability of Title VII.")

[35] S. CONF. REP. NO. 92-681 at 19 (1972); H.R. CONF. REP. NO. 92-899 at 19 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2179, 2183.

[36] 118 CONG. REC. 4942 (1972) (remarks of Sen. Williams).

charge being brought by anyone. Some of those may have been pending for 2 or 3 years already, so we are talking now of probably 5 years in which back pay can be requested.

I just do not think that was a wise decision. I think the House would have stood by the position of those of us who felt that this was unwise, and that the 2-year statute of limitations in this bill should have been 2 years prior to the enactment of the act. I think that would have been advisable.[37]

No member of the House disagreed with Quie's description of the bill or suggested that the limitation period would ordinarily be 180 or 300 days.

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[37] 118 CONG. REC. 7569-70 (1972) (remarks of Rep. Quie).